91-1540

Supreme Court, U.S.
FILED
MAR 20 1992
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

IN RE WAYNE SHUMA AND AMELIO GALLO, D/B/A PLAZA VENDING CO. AND PLAZA VENDING FAMILY FUN AND GAMES,

Petitioner,

vs.

K. LAWRENCE KEMP, TRUSTEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Allen N. Brunwasser
Attorney for Petitioner
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Pittsburgh, PA 15222
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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. IF DISTRICT COURT JURISDICTION TO ENTERTAIN AN APPEAL FROM A BANKRUPTCY COURT IS RAISED FOR THE FIRST TIME IN APPELLEE'S CIRCUIT COURT BRIEF, SHOULD THE CIRCUIT COURT DISMISS THE APPEALS FOR LACK OF DISTRICT COURT AND/OR ITS OWN JURISDICTION WITHOUT FIRST GIVING APPELLANT AN OPPORTUNITY TO ARGUE THE ISSUE?

II. ASSUMING, ARGUENDO, THAT ALL ORDERS ON APPEAL FROM THE BANKRUPTCY COURT ARE INTERLOCUTORY, DOES A COURT OF APPEALS HAVE JURISDICTION TO ENTERTAIN APPEALS FROM THE DISTRICT COURT WHEN THE DISTRICT COURT DISMISSES THE APPEALS FOR NON-INTERLOCUTORY REASONS AND AFTER THE APPEALED ISSUES HAD BEEN PRESENTED?

III. SHOULD THIS CASE AWAIT DECISION IN GERMAIN V. THE CONNECTICUT MUTUAL BANK, OCTOBER 15, 1991, NO. 90-1781?

IV. IF APPELLEE RAISED LATE FILING OF AN APPEAL FROM A BANKRUPTCY COURT TO A DISTRICT COURT FOR THE FIRST TIME IN HIS CIRCUIT COURT BRIEF, SHOULD APPELLANT BE FIRST GIVEN AN OPPORTUNITY TO PROVE THE APPEAL WAS TIMELY FILED BEFORE THE CIRCUIT COURT DISMISSES IT AS FILED LATE?

LIST OF PARTIES

The Petitioners are Wayne Shuma and Amelio Gallo, d/b/a Plaza Vending Co. and Plaza Vending Family Fun and Games. The Respondent is K. Lawrence Kemp, Trustee.

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The United States Court of Appeals filed no opinion. Its orders have been reproduced in the Appendix. (1-A to 3-A - orders of November 25, 1991; December 27, 1991 order denying rehearing (4-A to 5-A). The March 14, 1991 opinion of Bankruptcy Judge Bernard Markovitz is reported at 124 B.R. 668.

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STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered in the United States Court of Appeals for the Third Circuit on November 25, 1991. Rehearing was denied on December 27, 1991. The jurisdiction of the United States Supreme Court to grant certiorari is founded upon 28 USC 1254(1).

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CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Fifth Amendment to United States Constitution, "No person shall be deprived of life, liberty, or property, without due process of law -"

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CONCISE STATEMENT OF THE CASE CONCERNING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

This case involves two petitions to put Petitioners into involuntary Chapter 7 Bankruptcy in the Bankruptcy Court in the Western District of Pennsylvania at No. 83-0889-M and No. 84-1820-M.

Petitioners appealed various adverse to them decisions to the United States District Court for the Western District of Pennsylvania where the cases were numbered

C.A. 90-135, C.A. 90-154 and C.A. 90-439. Jurisdiction of the District Court is provided by 28 USC 1334 which directs "the District Courts shall have original jurisdiction, exclusive of the states, of all matters and proceedings in bankruptcy.

The court's clerk assigned the cases to District Judges Donald E. Ziegler and Gustave Diamond.

At no time did Respondent or either judge raise any question about the appealed orders being interlocutory and the merits of the issues on appeal were litigated.

However, all appeals were dismissed for other technical reasons, and Petitioners filed timely appeals to the United States Court of Appeals for the Third Circuit at Nos. 91-2370, 91-3271 and 91-3349.

On May 10, 1991, after oral argument, Senior Third Circuit Judge Joseph F. Weis, Jr., granted a stay subject to reconsideration by a court panel.

On June 3, 1991, a panel composed of Circuit Judges Stapleton, Hutchinson and Alito, continued the stay but directed the stay issue be treated "as a petition for a writ of prohibition and the clerk shall assign that petition to a merits panel." This element of the case became C.A. 91-3332.

After all four proceedings were consolidated by the clerk on June 3, 1991, a brief and a separate appendix for the three appeals and the petition for writ of prohibition were filed and served by Petitioners.

For the first time, Respondent, in his brief, argued that the appeals were

interlocutory and the appeal from the Bankruptcy Court to the District Court was filed too late at C.A. 90-135, which was No. 91-3349 in the Court of Appeals. He also said the appeal in that case from the District Court to the Circuit Court was late (pages 1-3).

Respondent Trustee, for the first time, also argued that C.A. 90-154 (No. 91-3270 in the Circuit Court) was interlocutory and also might be untimely (pages 3-4), and that C.A. 90-439 (No. 91-3271 in the Court of Appeals) was interlocutory (pages 4-5).

For his untimely argument, Respondent relied only upon Re Abdallah, C.A. 1, 1985, 778 F2d 75, cert. denied, 476 US 1116 (1986) and on the interlocutory issue solely on Re Gracy, 80 B.R. 675, E.D. Pa., 1987, affirmed without opinion in a

memorandum decision in the then non-precedental tables at C.A. 3, 1989, 849 F2d 601, cert. denied, 488 US 880 (1989) and Re Johns-Manville Corp., 1985, S.D.N.Y., 47 B.R. 957.

Although the above material appeared in Respondent's "Statement of Appellate Jurisdiction" (pages 1-5), it was not mentioned in his "Counter Statement of the Issues" (page 6) or argued in his "Argument" (pages 14-18). He did state in his "Conclusion" (page 17) "- all the bankruptcy orders that generated these appeals were interlocutory."

On July 19, 1991, the Circuit Court advised the appeals would be decided on August 13, 1991 on the briefs filed by provision of Circuit Rule 12(6) by a panel composed of Circuit Judges Cowen, Nygaard and District Judge Pollak. However, on

September 3, 1991, Circuit Judge Robert E. Cowen, also speaking for new panel Circuit Judge Members Mansmann and Roth, advised the decision would be made November 18, 1991 "on the briefs pursuant to Third Circuit Rule 12(6)."

This rule controls the privilege of oral argument and how the decision to grant it is made. It first advises: "Experience discloses that judges usually vote to eliminate oral argument" and then goes on to explain, in relevant part, when it will be denied:

"Where the issue is tightly constrained, not novel, and the briefs adequately cover the arguments" (121(6) 3a(a)).

"Where the outcome of the appeal is clearly controlled by a decision of the

Supreme Court or this Court" (12(6) 3a(4)).

The said rule then goes on to explain (12(6) 3b) that "Experience discloses that judges usually vote for oral argument:

"(1) Where the appeal presents a substantial and novel legal issue" and

"(2) Where the appeal presents one or more issues, the resolution of which will be of institutional or precedental value" and

"(3) Where a judge has questions to ask counsel, the answers to which will clarify an important legal, factual or procedural point" (emphasis supplied).

On November 25, 1991, the panel, speaking through Circuit Judge Cowen, dismissed all three appeals. It said: "After considering the contentions raised

by appellants, and this court concluding that it has no jurisdiction, See In Re Abdallah, 778 F2d 75 (1st Cir. 1985, cert. denied, 476 US 1116 (1986); In Re Gracey, 80 B.R. 675 (E.D. Pa. 1987), Aff'd w/o Opinion, 849 F2d 1601 (3d Cir. 1988), cert. denied, 488 US 950 (1989); it is:

ADJUDGED AND ORDERED that the appeal be and is hereby dismissed. Costs taxed against appellants" (1-A to 2-A).

In the prohibition case (No. 91-3332), the panel, again speaking through Circuit Judge Cowen, said: "After considering the contentions raised by petitioners; it is

ADJUDGED AND ORDERED that the Petition for Writ of Prohibition be and is hereby denied" (3-A).

Petitioner then filed and served a timely "Motion for Panel Hearing and Suggestion of Rehearing in banc" (9a-28a). On December 27, 1991, this motion was denied (7a). On or about January 31, 1992, Petitioners filed a "Motion to Reconsider Order of January 21, 1992, in light of subsequent events and to toll period in which certiorari petition must be presented to U.S. Supreme Court" (24a-31a). On the 13th day of February, this motion was denied. The January 21, 1992 order had refused to return the mandate.

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REASONS FOR ALLOWANCE OF THE WRIT

Petitioners argued what has become questions I, II and IV in their rejected by the Court of Appeals motion for rehearing (9a-28a). They incorporate that

material here in urging the writ of certiorari be granted.

The record in this case clearly discloses that no lower court or respondent ever indicated Petitioners had filed any appeal from the Bankruptcy Court late or that any issue in the District Court was interlocutory.

If they had, a factual record could have been made at an evidentiary hearing which Petitioners would have then and there requested and briefs and argument could have been supplied to aid a learned decision.

Instead, Appellee-Respondent, as pointed out above, raised these issues in his appeal brief for the first time and the Court of Appeals agreed without granting Petitioners an opportunity to speak to the new problem (2a-3a).

Petitioners respectfully suggest that if these new issues (which required dehors record development of new facts) were to be considered, oral argument under circuit Rule 12(6), detailed above, should have been allowed so counsel could at least be questioned by the panel and an informed decision made whether a remand to develop additional facts and supply new case law was necessary or advisable.

Any argument that this was cured by Petitioner's Motion for Reargument (7a to 28a) neglects the issue of allocation of burden of proof. Respondent would be the moving party if Petitioner had to resist his motion whereas Petitioners had the burden of proof to convince the Court of Appeals that the panel was wrong, after the November 25, 1991 decision was made. Armstrong v. Manzo, 1965, 380 US 545, 551,

85 S.Ct. 1187, 1191, and without an opportunity to factually prove it.

Petitioners' research has disclosed that this Court, the U.S. Court of Appeals for the Third Circuit and for the 11th, 1st, 7th, 2nd and 6th Circuits require an opportunity to respond before a case is dismissed for lack of jurisdiction or because of an opposite party challenge.

Lankford v. Idaho, May 20, 1991, ___ US ___, 111 S.Ct. 1723, 1733, N. 22, reversed a sentence of death when no presentence notice that it might be imposed was given. ("In a variety of contexts, our cases have repeatedly emphasized the importance of giving the parties sufficient notice to enable them to identify the issues on which a decision may turn").

After declaring what happened, a due process violation, Armstrong v. Manzo, was cited in re requiring notice before the decision and advising an after decision opportunity to argue the ruling be revoked was insufficient as this reversed the burden of proof. See also Carey v. Piphus, 1978, 98 S.Ct. 1042, 1051, 435 US 247, 261-262 (decision without prior opportunity to be heard violates due process even if same decision would be made after opportunity given).

In Berandi v. Swanson Memorial Lodge, etc., 1990, C.A. 3, 920 F2d 198, 200, a judge of the Pennsylvania District Court was reversed by the Third Circuit Court of Appeals because he dismissed a case for lack of jurisdiction without first giving the losing party an opportunity to meet the issue.

Five other circuit appeals courts have taken the same position. Square D Co. v. Niagra Frontier Tariff Bureau, C.A. 2, 1985, 760 F2d 1347, 1365, affirmed 476 US 409, 414, 106 S.Ct. 1922, 1925 ("Failure to afford an opportunity to address the court's sua sponte motion to dismiss is, by itself, grounds for reversal"); Chalwest Limited v. Ellis, 1991, C.A. 11, 924 F2d 1011, 1014 and N. 3 at page 1013 (issue of personal jurisdiction requires hearing to resolve the facts); Colonial Pipeline Co. v. Collins, 1991, C.A. 11, 921 F2d 1237, 1243 ("A plaintiff must have ample opportunity to present evidence bearing on the existence of jurisdiction"), and Preterm, Inc. v. Dukakis, 1979, C.A. 1, 591 F2d 121, 134 (issue of standing dismissal reversed - "Although a court may dismiss an action at its own instance, as apparently happened

here, it must first afford the parties an opportunity to oppose the dismissal"); Shockley v. Jones, 1987, C.A. 7, 823 F2d 1068, 1073 and N. 3, citing similar courts of appeal in five circuits (case dismissed for lack of subject matter jurisdiction and failure to state claim affirmed as remand futile - "Thus, even where the dismissal is on jurisdictional grounds, unless the defect is clearly incurable, a district court should grant the plaintiff leave to amend, allow the parties to argue the jurisdictional issue, or provide the plaintiff with the opportunity to discover the facts necessary to establish jurisdiction").; Franklin v. State of Oregon, State Welfare Division, 1981, C.A. 6, 662 F2d 1337, 1340-1341 (Prisoner's suit dismissed before summons served because it did not support a claim; reversed; court must first "notify the plaintiff of the

proposed action and afford him an opportunity to submit written argument in opposition" or "to amend" so court does not appear to be "a proponent rather than an independent entity").

Petitioners thus respectfully suggest the circumstances of the November 25, 1991 order (2a) deprived them of Fifth Amendment due process and was also contrary to established pre-decision established procedure. Since this is certainly a matter of great public interest, and this decision overrules accepted case law, they urge this highest court to grant the writ and then reverse.

Petitioners also respectfully suggest the interlocutory issue decision will be aided if the pending Germain issue of Question III is ended by reversal of the second Circuit Court of Appeals and

approval of what the Third Circuit Court of Appeals previously ruled.

As recently as December 5, 1991, the U.S. Court of Appeals for the Third Circuit has indicated even its own judges are not in agreement on what is a final bankruptcy order. In Re BH and P, Inc., December 5, 1991, C.A. 3, 949 F2d 1300, 1306 (opinion of Circuit Judge Mansmann) observed "finality in a more pragmatic and less technical way in bankruptcy cases than in other situations" and "to avoid the waste of time and resources" of awaiting the case ending "courts have permitted appellate review of orders that in other contexts might be considered interlocutory."

Circuit Judge Hutchinson (949 F2d at 1318) appears to personally disagree but goes along due to internal operating Rule

9.1 and contrasts the finality rule of 11 USC 158(d) with the interlocutory grace option of 11 USC 158(a) (page 1320, N. 3).

The case involved removal of a trustee and his counsel, an issue usually held interlocutory. (See N.1, page 1319 as to counsel).

Petitioners respectfully request the writ be allowed on the interlocutory issue as a decision by this motion's highest court will certainly be of great public and professional interest and make the practice of law more efficient for courts and lawyers who do not want to risk loss of appeal rights by not appealing or appeal when to do so is improper.

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CONCLUSION

The writ should be granted.

Respectfully submitted,

Allen N. Brunwasser
Attorney for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3270

IN RE: WAYNE SHUMA and AMELIO GALLO,
d/b/a PLAZA VENDING CO. and
PLAZA VENDING FAMILY FUN AND GAMES,

Wayne Shuma, Amelio Gallo
and Allen N. Brunwasser,

Appellants

On Appeal
from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 90-00154)
District Judge: Hon. Donald E. Ziegler

No. 91-3271

IN RE: WAYNE SHUMA and AMELIO GALLO,
d/b/a PLAZA VENDING CO. and
PLAZA VENDING FAMILY FUN AND GAMES,

Wayne Shuma, Amelio Gallo
and Allen N. Brunwasser,

Appellants

On Appeal
from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 90-00439)

App. 2

District Judge: Hon. Donald E. Ziegler

No. 91-3349

IN RE: WAYNE SHUMA
t/d/b/a AMELIO GALLO,

Wayne Shuma and
Amelio Gallo,

Appellants

On Appeal from
the United States District of Pennsylvania
(D.C. Civil No. 90-00135)
District Judge: Hon. Gustave Diamond

Submitted Under Third Circuit Rule 12(6)
November 18, 1991

Before: MANSMANN, COWEN and ROTH
Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by appellants, and this Court concluding that it has no jurisdiction, see In Re Abdallah, 778 F.2d 75 (1st Cir.

1985), cert. denied, 476 U.S. 1116 (1986); In Re Gracey, 80 B.R. 675 (E.D. Pa. 1987), aff'd w/o opinion, 849 F.2d 601 (3rd Cir. 1988), cert. denied, 488 U.S. 950 (1989); it is

ADJUDGED AND ORDERED that the appeal be and is hereby dismissed. Costs taxed against appellants.

ATTEST: By the Court,

Sally Mrvos, Clerk Robert E. Cowen
Dated: 11/25/91 Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3332

IN RE: WAYNE SHUMA and AMELIO GALLO,
d/b/a PLAZA VENDING CO. and
PLAZA VENDING FAMILY FUN AND GAMES,

Wayne Shuma, Amelio Gallo
and Allen N. Brunwasser,

Petitioners

On Appeal
from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 90-00439)
District Judge: Hon. Donald E. Ziegler

Submitted Under Third Circuit Rule 12(6)
November 18, 1991

Before: MANSMANN, COWEN and ROTH,
Circuit Judges

ORDER

After considering the contentions raised by petitioners; it is

ADJUDGED AND ORDERED that the Petition for a Writ of Prohibition be and is hereby denied.

ATTEST: By the Court,

Sally Mrvos, Clerk
Dated: 11/25/91

Robert E. Cowen
Circuit Judge

App. 6

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3270

IN RE: WAYNE SHUMA and AMELIO GALLO,
d/b/a PLAZA VENDING CO. and
PLAZA VENDING FAMILY FUN AND GAMES,

Wayne Shuma, Amelio Gallo
and Allen N. Brunwasser,

Appellants

No. 91-3271

IN RE: WAYNE SHUMA and AMELIO GALLO,
d/b/a PLAZA VENDING CO. and
PLAZA VENDING FAMILY FUN AND GAMES,

Wayne Shuma, Amelio Gallo
and Allen N. Brunwasser,

Appellants

No. 91-3332

IN RE: WAYNE SHUMA and AMELIO GALLO,
d/b/a PLAZA VENDING CO. and
PLAZA VENDING FAMILY FUN AND GAMES,

Wayne Shuma, Amelio Gallo
and Allen N. Brunwasser,

Petitioners

No. 91-3349

IN RE: WAYNE SHUMA
t/d/b/a AMELIO GALLO,

Wayne Shuma and
Amelio Gallo,

Appellants

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge; BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and ROTH, Circuit Judges

The petition for rehearing filed by appellants/petitioners in the above-entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having

asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Robert E. Cowen
Circuit Judge

Dated: Dec. 27, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 91-3349, 91-3270, 91-3271, 91-3332

IN RE WAYNE SHUMA AND
AMELIO GALLO, d/b/a PLAZA
VENDING CO. AND PLAZA VENDING
FAMILY FUN AND GAMES

MOTION FOR PANEL REHEARING AND
SUGGESTION OF REHEARING IN BANC

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Certification of Service

On the 6th day of December, 1991,

copy mailed to K. Lawrence Kemp, Esquire.

Allen N. Brunwasser

To the Honorable, the Chief Judge and the Associate Judges of the United States Court of Appeals for the Third Circuit:

Wayne Shuma and Amelio Gallo respectfully aver:

1. On November 25, 1991, a panel of this high Court (Mansmann, Cowen and Roth, Circuit Judges) entered judgment orders dismissing these cases because it lacked jurisdiction due to an untimely appeal and because the orders were interlocutory. The orders are attached.

2. Appellants respectfully suggest the panel made the following errors of fact and law.

THE APPEAL FROM THE DECEMBER 5, 1989 ORDER OF THE BANKRUPTCY COURT WAS NOT LATE SO THIS COURT DOES HAVE JURISDICTION

A. Docket entry #77 clearly discloses that the order of December 5, 1989 was not docketed until December 7, 1989.

(1) At bankruptcy number 83-889, the entry says "Hrg. held on 89-7222M.

O/E that debtors are to file full and correct Sch w/i 60 days. Order signed 12/5/89 EOD 12/7/89. 11C.M.: Kemp, Finkel, Brunwasser" A photo of he page on which this entry appears is attached. It has been circled and arrowed for easy identification and also appears at page 25 of appellees Brief filed in Nos. 91-3270, 91-3271 and 91-3349.

(2) The same entry appears in Joined Case Bankruptcy Number 84-1820 a photo of which is also attached. The unnumbered entry is circled and arrowed.

(3) A photo of Bankruptcy D.E. 77 in No. 83-889 also appears in appellants' No. 91-3332 appendix at 151a. and a photo of the No. 84-1820 entry appears at 158a.

B. Appellants are not certain when

their counsel received a copy of the December 7, 1989 docketed order. However, on December 14, 1989, they mailed a notice of appeal to the clerk of the Bankruptcy court and also mailed a copy of the Notice of Appeal to appellee Kemp.

C. As can be observed from the attached Calendar, December 14, 1989 was a Thursday so the notice should have arrived at the Bankruptcy Clerk's office on or before the last day for filing which was December 18, 1989. (a Monday). It was mailed from downtown Pittsburgh and the Clerk's office is in Pittsburgh.

D. As can be seen from the attached Clerk's receipt, the appeal was not docketed until 9:20 A.M. on December 19, 1989.

(1) Appellants believe the appeal notice was received before December 19, 1989 and now ask for a remand for

an evidentiary hearing as to when the Notice of Appeal was <u>received</u> as distinguished from when it was entered in the docket by a clerk.

(2) Appellants respectfully suggest that if the said notice was not received in the mailroom of the District Court until December 19, 1989 that it could not have been sorted, delivered, read, evaluated and entered in the docket and a receipt made out by 9:20 A.M. - 20 minutes after the Clerk's office opened.

(3) Appellant's counsel has observed that mail from him to the clerk and from clerk to him takes one day so his notice should have arrived at the U.S. Courthouse on December 15, 1989 and believes it arrived <u>before</u> it was docketed on a date previous to

December 19, 1989 and requests a remand to prove it if he can.

E. If the notice was late and the ten day appeal time had run, the Clerk would have rejected it. If Mr. Kemp who is based in New Kensington had not received his copy until December 19, 1989, one day late, appellants respectfully suggest this experienced bankruptcy attorney (114a-119a) would have swiftly moved to quash it as he has often moved to punish appellants for other alleged defects in this litigation.

F. If any question about the timeliness of this appeal had been raised by the clerk or Trustee Kemp, appellants would have promptly requested Bankruptcy Rule 9006(b)(1)(2) and/or 8002(c) relief.

G. The above described appeal eventually became No. 91-3349 in this high Court and it was not until appellee Kemp

filed his Brief, received July 31, 1991, that this problem was raised for the first time. See attorney Kemp's Brief, mailed July 30, 1991, pages 1-2.

ARGUMENT ON THIS ISSUE

H. Bankruptcy Rule 9021 directs, inter alia, "A Judgment is effective when entered as provided in rule 5003". Rule 5003 advised inter alia, "the entry of a judgment or order in a docket shall show the date the entry is made." The Clausen Co. v. Dynathon Bondo Corp., 1989, C.A. 3, 889 F.2d 459, 464 C.D. 110 S.Ct 2174 agrees.

I. The United States Court of appeals has clearly ruled that the date an appeal is filed is when it is received - not when the Clerk gets around to making a docket entry. U.S. v. Solly, 1976, C.A. 3, 545 F.2d 874, 876, U.S. v. Giana, 1989 C.A. 3, 864 F.2d 313, 315 which approves

SOLLY, Gould v. The Members of the N.Y. Division of Water Policy and Supply, 1977, C.A. 3, 555 F.2d 340, 341, also approving Solly and remanding for an evidentiary hearing as to when the notice of appeal was received.

J. Matter of Pigge, 1976, C.A. 4, 539 F.2d 369 held that a December 27, 1974 mailing of an appeal from a December 17, 1974 order was timely even though not received until December 30, 1974, but observed (N3) that other circuits disagree.

K. Pigge and cases contra were all left undisturbed by Houston v. Lack, 1988, 487 U.S. at 274, 108 S.Ct. at 2384.

(1) Houston involved a prisoner's Habeas Corpus which arrived one day late.

(2) The Court of Appeals noticed the problem but issued a rule to show

cause in order to allow the prisoner to respond (appellants were not given that opportunity by this Court's November 25, 1991 Judgment Order and request it here plus a remand to develop relevant facts).

(3) The U.S. Supreme Court (108 S.Ct. at 2284) noticed that deposit in the mail is filing by specific provision of its rule 28.2 and that "filing" has never been defined and that the date of receipt of the notice, not when it is entered in the docket, control citing SOLLY. N.2 observes that the U.S. Supreme Court has never rejected "the mailbox rule".

(4) That highest Court also specu-lates on whether the early morning stamps by the clerk was evidence of Court post office receipt the day

before (N.3, page 2385). This is exactly what appellants argue here and request a remand to prove if they can.

(5) U.S. v. Grana, supra approves Houston (N.8, page 315).

L. If Judge Diamond, to whom this case was assigned, believed the appeal to his Court was late, appellants respectfully suggest he would have dismissed it as he did in the case of In Re Universal Minerals, Inc., 1985, C.A. 3, 755 F.2d 309, 311 where this court of appeals gave appellants an opportunity to respond to the alleged tardiness before ruling against them. He, sua sponte, moved against appellants here in re another issue (see appellant's Brief, question I, pages 7-14, 27-29, Question No. II, pages 29-37, Question No. III, pages 38 to 41).

M. Even if the appeal was late by

one day, appellant respectfully suggest it is still timely by specific provision of Bankruptcy rule 9006(f). This rule, which deals with enlargement of appeal time, directs in subsection (f), effective June 24, 1984, "where there is a right or requirement to do some act or undertake some proceeding within a prescribed period after service of a notice or other paper and the notice or other paper is served by mail, three days shall be added to the prescribed period".

Thus, the last day to file the appeal from the December 7, 1989 docketed order would be December 20, 1989.

O. Also Bankruptcy rule 9006(e) directs "service of process and service of any paper other than process or notice by mail is complete on Mailing".

P. Bankruptcy Rule 1 directs "these rules shall be construed to secure - the

just determination of every proceeding therein". Appellants respectfully urge the Court of Appeals to thus construe Rule 9006(b) to cover this issue and rule the appeal timely filed. Bankruptcy rules 5005, 9001 and 9002, which contain definitions, do not mention when an appeal is filed.

Q. Appellee only attacks the December 5, 1989 appeal. (see pages 17-18 of his Brief and also might have misled this Court by claiming the order was effective December 5, 1989 instead of December 7, 1989 (see page 2, line 17, Lines 21-22 "the order of the Bankruptcy Court entered December 5, 1989")

R. On page 2 of his Brief, Appellee discusses the subsequent issue of a late FRCP 59 Motion. Appellants response is contained in Question I of their Brief, pages 7-14. Abdullah, cited in the

November 25, 1991, Judgment order does not cover this issue of "Unique circumstances" so appellants have concluded it was not considered by the panel or whoever made the decision.

S. In re the appeal to the panel review provided by Rule 8011(e) (see appellee's Brief, page 3-4), another aspect of In re GRACY, relied upon in the November 25, 1991 Judgment order, holds an appeal to a nonexistent Bankruptcy panel does not destroy the appeal. In re GRACY, 79 B.R. 219, 221, N.7.

CONCLUSION

The Court of Appeals is respectfully asked to rule that the appeals were proper or, in the alternative, remand for an evidentiary hearing in re when the notice of appeal was received and what Judge Diamond's staff did to mislead appellants.

THE INTERLOCUTORY ISSUE

T. The Judgment Order cites only In re GRACY, 80 B.R. 675, aff'd w/o opinion 849 F.2d 601, C.A. 3, 1988, cert. denied, 488 U.S. 950, 1989, as authority for its finding the orders were all interlocutory.

(1) That case, which involved denial of a motion to operate schools, is non-precedential and should not have been relied upon here.

(2) U.S. v. Turley, 1989 C.A. 3, 891 F.2d 57, 60 advises, inter alia, that "-our internal operating procedures make clear that only published opinions of this court are regarded as precedential. Third Circuit I.O.P. ch. 5, sec. A.2".

(3) Even if this were not so, Gracey, contains language favorable to appellants here when it instructs (80 B.R. at 676=7) "Finality, however

is viewed more flexibly in the Bankruptcy context than it is in other civil litigation" In re Comer, 716 F.2d 168, 171 (3 d Cir. 1983) and then goes on to explain some of the factors considered.

(4) But Gracey went on to affirm on he merits (80 B.R. at 677-678) because the district court did not want to be "an overseer of the Bankruptcy Judge, a role we Loathe to accept".

U. In addition, both Judge Ziegler and Diamond accepted the appeals and decided issues and thus exercised their Bankruptcy rule 8001(b) right to sua sponte grant review of an interlocutory appeal, see In re Allegheny International, 1989, W.D. Pa., Judge Bloch, 107 B.R. 518, 522 which also explains the broader appeal aspects of the District and Court of

Appeals (N.2, page 521 citing Third Circuit Court of Appeals cases) and explains "the question of finality of Bankruptcy orders has been repeatedly pondered by the Third Circuit but the boundaries of finality remain amorphous" and (N. 2, page 521) "However, the same test for finality applies to the jurisdiction of District Courts to hear appeals from Bankruptcy Courts" See also In re F/S Airlines, II, Inc. (Judges Markovitz and Ziegler reversed) 1988, C.A. 3, 844 F.2d 99, 103, 104 (Bankruptcy orders held appealable when they would not be in other litigation, denial of counsel appealable, "and thus it appears that the district court and the parties treated the Bankruptcy Court's order as appealable").

V. In re Gianakas, 100 B.R. 787, affirmed, 1990 C.A. 3, 917 F.2d, 759, 760 held that the District Court (here Judge

Block) could take the interlocutory appeal sua sponte without motion and that the Third Circuit Court of Appeals could also "choose to exercise its discretion and consider this appeal sua sponte (emphasis in case Text) even if the order were not final". See 100 B.R. 787 in re sua sponte.

W. Appellants argue appealability in pages 1-2 of their Brief and their letter Brief (168a-169a) and in their #91-3332 Brief at pages 16-17 and pages 10-13 of their No. 91-3332 reply Brief and respectfully request this material be considered as part of this Motion.

X. A previous panel of this Court (Stapleton, Hutchinson and Alito, Circuit Judges) issued a June 3, 1991 Order (186a) converting part of this appeal to a request for a Writ of Prohibition. (186a at #91-3332 appendix). Those distin-

guished Judges did not quash the appeals for late filing or interlocutory defects and appellants respectfully suggest the present panel should not take a different approach.

Y. The December 5, 1989 Order was in the form of a mandatory injunction and Judge Markovitz attempted to enforce it by contempt. Thus, Hershey Foods Corp,v. Hershey Creamery Co., October 3, 1991, C.A. 3, 945 F.2d 1272 standards might apply.

CONCLUSION

The Orders are not interlocutory and Gracey is not authority for the Judgment Order.

THE ISSUE OF REOPENING THE MAY 28, 1985 ORDER OF JUDGE GIBSON

Z. The issue was presented to Judge Weis (pages 1a-4a, No. 91-3332, plus attachments which follow). It has been Briefed (pages 48-53 of 4 case Brief).

BEST AVAILABLE COPY

Appellants respectfully request this issue be decided or remanded to the District Court with an Order it be decided there. Otherwise it will remain in limbo forever.

CERTIFICATION

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to-wit, the panel's decision is contrary to the decision of this Court of the Supreme Court in the cases cited in this Motion. The appeal involves a question of exceptional importance which is when an appeal from the Bankruptcy Court to the District Court is considered "filed". i.e., when

received or when docketed and whether the orders in this case, now presented for appeal, are interlocutory. Wherefore, panel reargument is requested and en banc review is suggested.

Respectfully submitted,

Allen N. Brunwasser
Attorney for Appellants

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 91-3270, 91-3271, 91-3332, 91-3349

IN RE WAYNE SHUMA AND
AMELIO GALLO, d/b/a
PLAZA VENDING CO. AND
PLAZA VENDING FAMILY
FUN AND GAMES,

MOTION TO RECONSIDER ORDER OF JANUARY 21, 1992, IN LIGHT OF SUBSEQUENT EVENTS AND TO TOLL PERIOD IN WHICH CERTIORARI PETITION MUST BE PRESENTED TO U.S. SUPREME COURT

1. Petitioners respectfully request this high Court's forgiveness for filing their additional motion, but believe it necessary in order to risk any claim they have waived in the issue presented.

2. On December 30, 1991, reargument was denied.

3. On or about January 17, 1992, in researching another case, Petitioners'

counsel noticed on Page 10 of the 132 B.R. #4 advance sheets that the U.S. Supreme Court had granted certiorari in Germain v. The Connecticut Mutual Bank, February 15, 1991, C.A. 2, 926 F2d 191 on the issue of whether a Court of Appeals had jurisdiction to review an appeal decided by the District Court when the Bankruptcy Court order was interlocutory. It said, "The Supreme Court has agreed to review the question of appellate jurisdiction over interlocutory bankruptcy appeals raised in Germain v. Connecticut National Bank, 926 F2d 191 (C.A. 2 - Conn. 1991)"

4. Counsel then read Germain, which said it could not, but observed the Third Circuit Court of Appeals had arrived at the opposite conclusion in Coastal Steel Corp. v. Tilgman Wheelabrator Ltd., 1983, C.A.3, 709 F2d 190, 200, N.7, C.D. 464 US 938, 104 S.Ct. 349.

5. Examination of Coastal confirmed that what was said in Germain was true.

6. The grant of certiorari in Germain also is published in 112 S.Ct. #5 advance sheets at VII and XIV.

7. Petitioners have had Coastal shepardized, and it has not been over-ruled.

8. They respectfully suggest the panel in their case might have overruled Coastal contrary to internal operating rules I.B. and IIA2.

9. That the expense of a printed petition for certiorari plus the $300 docket fee is a hardship Petitioners would prefer to avoid.

10. They thus respectfully request the panel consider amending the judgment holding the appeal interlocutory as permitted by internal operating rule Q6d in re whether it is interlocutory or, in

the alternative, recall the mandate and stay the period for requesting certiorari until the Supreme Court decides Germain.

Respectfully submitted,

_____

ALLEN N. BRUNWASSER
Attorney for Petitioners

CERTIFICATION OF SERVICE

On the 30th day of January, 1992, copy mailed to K. Lawrence Kemp, Esq., and hand delivered to Judge Donald E. Ziegler.

ALLEN N. BRUNWASSER

(2)

Supreme Court, U.S.
FILED
APR 17 1992
OFFICE OF THE CLERK

No. 91-1540

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

IN RE WAYNE SHUMA AND AMELIO GALLO, D/B/A PLAZA VENDING CO. AND PLAZA VENDING FAMILY FUN AND GAMES,

Petitioner,

vs.

K. LAWRENCE KEMP, TRUSTEE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

K. Lawrence Kemp
Attorney for Respondent
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953 Fifth Avenue
New Kensington, PA 15068
(412) 339-4363

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER LACK OF APPELLATE JURISDICTION MAY BE RAISED AT ANY STAGE IN THE CASE.

II. DOES A DISTRICT COURT'S DISMISSAL OF AN APPEAL FROM BANKRUPTCY COURT ON PROCEDURAL GROUNDS VEST THE CIRCUIT COURT WITH APPELLATE JURISDICTION WHERE THE BANKRUPTCY COURT ORDERS ORIGINALLY APPEALED FROM WERE INTERLOCUTORY?

III. IS GERMAIN v. CONNECTICUT MUTUAL BANK CONTROLLING OR EVEN RELEVANT?

IV. WHETHER THE DOCTRINE OF UNIQUE CIRCUMSTANCES IS APPLICABLE.

V. IS THERE ANY GROUND TO GRANT CERTIORARI?

PARTIES

In addition to the parties named in the caption of the Petition for Writ of Certiorari, it would appear that counsel for Petitioners, Allen N. Brunwasser, is also a party. The appeal before the Third Circuit at No. 91-3271 was of an Order of the District Court's Order dismissing the appeal from the Bankruptcy Court Order which removed Allen N. Brunwasser as coun-

sel for the debtor. The appeal from Bankruptcy Court to District Court specifically listed Mr. Brunwasser as a party.

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COUNTERSTATEMENT OF JURISDICTION

This court lacks jurisdiction because the orders appealed from were interlocutory, the appeals were filed late and the appeals to District Court were not properly perfected.

The appellate jurisdiction of the United States District Courts over appeals from the United States Bankruptcy Courts is conferred by 28 U.S.C. §158(d). United States Courts of Appeals are granted judicial power to hear appeals from United States District Courts by 28 U.S.C. §1291.

Respondent contends that there are two jurisdictional defects with these appeals from which the within Petition for Writ of Certiorari flows, both of which defects are fatal.

APPEAL AT NO. 91-3349

The Court of Appeals lacked appellate jurisdiction over the matters appellants sought to raise in District Court No. CA 90-135, Court of Appeals No. 91-3349, because their appeal was untimely. This is so in two respects.

The origin of this matter lies with an Order of the Bankruptcy Court on December 5, 1989. The time period for an appeal is ten days. Bankruptcy Rule 9002(a). The appeal was not filed until December 19, 1989.

The appeal was not filed until December 19, 1989, fourteen days after the Order appealed from. Thus, the District Court lacked jurisdiction, the Court of Appeals lacked jurisdiction and this Court lacks jurisdiction. Re Abdallah, 778 F.2d 75 (1st Cir. 1985), cert. denied, 476 U.S. 1116 (1986). (Note that Bankruptcy

Rule 9006(a) provides that intermediate Saturdays, Sundays and holidays are counted among the ten days.)

The second respect in which the appeal is untimely is the appeal from District Court to this Court. On May 21, 1990, the District Court entered an Order Dismissing the appeal from the Bankruptcy Court's December 5, 1989 Order because debtors failed to file a brief within the time permitted.

Instead of appealing to the Court of Appeals, on June 6, 1990, appellants filed a Motion to Revoke Order of May 21, 1990 etc. The last day on which such a Motion could be filed and be effective at extending the time for an appeal was June 5, 1990. Appellants reacted to this fatal flaw by filing a Motion for Application of Doctrine of Unique Circumstances. The

District Court denied that Motion in its Order of May 10, 1991.

The second jurisdictional defect is that the Bankruptcy Court Order appealed from is interlocutory; and, hence, the District Court lacked jurisdiction. 11 U.S.C. §158(a); Re Gracey, 80 B.R. 675 (E.D. Pa. 1987), aff'd w/o opinion, 849 F.2d 601 (3d Cir. 1988), cert. denied, 488 U.S. 880 (1989), reh. denied, 488 U.S. 950 (1989). The Court of Appeals would then, in turn, lack jurisdiction. Abdallah, Supra.

APPEAL AT NO. 91-3270

The appeal of the District Court's May 7, 1991 and November 5, 1990 Orders at C.A. 90-154 similarly has its genesis in interlocutory Bankruptcy Court Orders entered September 19, 1989, October 2, 1989 and October 13, 1989 which denied

debtors' Motion for Reconsideration. This appeal was filed October 23, 1989 with the District Court.

The September 19, 1989 Bankruptcy Court Order denied debtor's Motion to Vacate Order Appointing Trustee and Giving Authority to Employ K. Lawrence Kemp as General Counsel. This is clearly interlocutory under Gracey, Supra and Re Johns-Manville Corp., 47 B.R. 957, CCH Bankr. L. Rptr. ¶70,267 (S.D. N.Y. 1985).

The October 2, 1989 Bankruptcy Court Order denied a Motion for Rule 8011(e) Panel Review of the September 19, 1989 Order of the Bankruptcy Court.

Since there is no appellate panel in the Third Circuit, such a Motion is a nullity and did not extend or preserve the time for filing an appeal to the District Court. Furthermore, Bankruptcy Rule 8011 is designed to govern motion practice

after an appeal has been taken from the bankruptcy court.

The October 2, 1989 order denying Panel Review was not a final judgment on the matter at issue; it was merely a determination that debtors were not entitled to have a Bankruptcy Appellate Panel review what was clearly an interlocutory order.

The October 13, 1989 Order denied a Motion for Reconsideration and Investigation of Office Procedures filed by Debtor. The denial of this Motion was clearly also interlocutory. Gracey, Supra.

No. 91-3271

The appeal of the District Court's Orders of May 7, 1991 and November 5, 1990 at C.A. 90-439 similarly has its genesis in an interlocutory Bankruptcy Court Order, that of January 24, 1990. This Order

denied Debtors' Motion to Remove K. Lawrence Kemp as Trustee and Kemp and Kemp as counsel for trustee, denied Debtors' Motion to Recuse Judge Bernard Markovitz and granted Trustee's Motion to Remove Counsel for Debtors and for Disgorgement of his Fees.

These are all interlocutory matters under Gracey, Supra. A decision refusing to remove a trustee is similar to a motion to disqualify counsel which has been held to be interlocutory. Re Johns-Manville Corp., 47 B.R. 957, CCH Bankr. L. Rptr. ¶70,267 (S.D. N.Y. 1984).

CONCISE COUNTERSTATEMENT OF THE CASE

In an effort to cut through the procedural morass of this bankruptcy case, the respondent will compartmentalize the facts of each appeal in chronological

order, using the Court of Appeals case numbers.

No. 91-3270

On August 11, 1989, the Debtor filed a Motion to Vacate Order Appointing Trustee and Giving Authority to Employ K. Lawrence Kemp as General Counsel. This Motion was assigned Motion No. 89-5217M. On September 19, 1989, the Court considered the Motion in Open Court with neither the moving party nor the respondent present and denied the Motion on the merits.

On September 28, 1989, debtor filed a Motion for Rule 8011(e) Panel Review at the same Motion Number. This Motion was denied without a hearing by Order signed September 27, 1989 and docketed October 3, 1989 for the expressed reason that the Motion did not refer to an appeal and its aim would be more practically served by a

review of the transcript of the hearing of September 19, 1989.

The Debtor on October 12, 1989, filed a Motion for Reconsideration and Investigation of Office Procedures at the same Motion Number. This Motion was also denied by Order signed October 13, 1989 and Docketed on October 16, 1989.

On October 23, 1989, Debtor filed a Notice of Appeal of the Orders of September 19, 1989, October 2, 1989 and October 13, 1989. On October 24, 1989, Deputy Clerk Joyce Pinchok sent debtor's counsel a letter directing parties to file copies of documents designated as part of the record on appeal. When debtor failed to do this, the Bankruptcy Court Clerk issued a Notice of intent to Transmit Partial Record on January 5, 1990.

This appeal was then on January 25, 1990 docketed by the District Court at

C.A. 90-154 and assigned to Judge Donald E. Ziegler. On November 5, 1990, the District Court dismissed the appeal for debtor's failure to comply with Bankruptcy Rule 8009 which requires a brief to be filed within fifteen days of the docketing of the appeal.

Debtor filed a Motion for Reconsideration, Reargument, Vacation and or Amendment of the Order of November 5, 1990 and a Motion to Recall the Reference. Both Motions were denied by Orders entered May 7, 1991. Apparently, the appeal from these Orders at District Court No. C.A. 90-154 were docketed in the Court of Appeals as No. 91-3270.

No. 91-3349

On December 5, 1989, Bankruptcy Court Judge Bernard Markovitz of the United States Bankruptcy Court for the Western

District of Pennsylvania entered an Order requiring the two general partners of this partnership debtor to file statements of their personal assets and liabilities.

Debtor appealed from this December 5, 1989 Order. Although the Bankruptcy Court entered an Order requiring the Appellant to provide copies of designated documents and the Clerk sent a letter to Appellants' counsel advising him that the Clerk intended to transmit a partial record, he failed to do these things.

This appeal was docketed by the District Court at C.A. 90-135 and assigned to Judge Gustave Diamond, who, on April 17, 1990 entered an Order requiring the debtor to show cause within eleven days why its appeal should not be dismissed for failure to file a Brief as required by Bankruptcy Rule 8009. When no response was filed, Judge Diamond's Deputy Clerk sent debtor's

counsel a letter on May 4, 1990, which letter noted the lack of a response and granted debtor an additional seven days within which to respond When no response was filed, on May 21, 1990, an Order was entered dismissing the said appeal.

On June 6, 1990, debtor filed a Motion to Revoke Order of May 21, 1990. This Motion was denied by Memorandum Order dated September 25, 1990.

On October 1, 1990, debtor filed a Motion for Application of Doctrine of Unique Circumstances. Additionally, debtor filed a Motion to Recall the Reference. Both of these Motions were denied in a Memorandum Order entered May 10, 1991.

An appeal of Judge Diamond's Order of May 10, 1991 was taken to the Court of Appeals and there docketed at No. 91-3349.

On November 7, 1989, the Trustee filed a Motion to Remove Counsel for the Debtors and for Disgorgement of Fees Paid Him. This Motion was docketed by the Bankruptcy Court Clerk at Motion No. 89-7222M.

On December 4, 1989, debtor filed a Motion to Recuse Judge Bernard Markovitz, and on December 5, 1989 debtor filed a Motion to Remove the Trustee.

A hearing was held on the Trustee's Motion (No. 89-7222M) on December 5, 1989 which resulted in an Order signed that day granting said Motion.

January 24, 1990, Judge Markovitz entered an Order which (1) denied Debtors' Motion to Remove K. Lawrence Kemp as Trustee; (2) denied Debtors' Motion to Recuse Judge Bernard Markovitz; and (3) Granted

Trustee's Motion to Remove Counsel for Debtors and for Disgorgement of Fees.

Debtor reacted by filing a Motion for Reargument, Reconsideration, etc. on February 5, 1990 which was denied by Order dated February 8, 1990 and filed February 9, 1990.

Debtors filed a Notice of Appeal on February 13, 1990. Despite the fact that a letter and an Order of Court were sent to debtors' counsel telling him to provide the Bankruptcy Court Clerk with copies of all documents designated as part of the record on appeal, he failed to do so, and a partial record was transmitted to District Court where it was docketed at C.A. 90-0439 and assigned to Judge Ziegler.

This appeal was treated similarly by Judge Ziegler to the one at C.A. 90-154. On November 5, 1990, he entered an Order

of Court dismissing the appeal for failure to file a brief.

Debtors countered with their Motion for Reconsideration etc. and Motion to Recall Reference. On May 7, 1991, Judge Ziegler entered an Order denying the Motion for Reconsideration and another denying the Motion for Recall of the Reference.

SUMMARY OF ARGUMENT

Appellate jurisdiction is an ever present issue which may not be waived by the parties but may be raised at any time, even on appeal from a decision from the appellate court lacking jurisdiction. Appellate jurisdiction depends in part on the jurisdiction of the court from which appeal is taken. If the court below lacked jurisdiction, the appellate court

does not have jurisdiction to decide the merits of the appeal.

The case of Connecticut National Bank v. Germain has been decided and is irrelevant because it involved appeals of an interlocutory decision where leave had been granted to take the appeal from bankruptcy court to district court and the district court had properly certified the matter as appealable to the court of appeals. Neither of those jurisdictional prerequisites were met in this case.

None of the factors relied upon to select cases for grant of certiorari are present in this case.

ARGUMENT

I. LACK OF APPELLATE JURISDICTION MAY BE RAISED AT ANY STAGE OF THE PROCEEDINGS.

The appellate jurisdiction of an intermediate appellate court may be raised for the first time on appeal from that court's decision. Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1976).

Petitioners have argued that since respondent did not raise the appealability of the Bankruptcy Court Orders at the District Court level, it was improper for him to have done so before the Court of Appeals. They overlook the fact that their appeals to District Court were dismissed because of their own failures to perfect the appeals by filing the briefs required by the Rules. The issue of wheth-

er the District Court had jurisdiction was never reached.

Moreover, appellant jurisdiction is subject matter jurisdiction and thus may be raised for the first time at any stage, even on a later appeal.

II. APPELLATE JURISDICTION DEPENDS UPON THE SUBJECT MATTER JURISDICTION OF THE COURT FROM WHICH THE APPEAL COMES.

It is axiomatic that where the court below had no subject matter jurisdiction, an appeal of its decision can vest the appellate court with no jurisdiction. United States v. Storer Broadcasting, 351 U.S. 192 (1956); Gillespie v. United States Steel Corp., 379 U.S. 148 (1964).

Where the appellant failed to meet the procedural requirements of the preceding appellate court, the higher appellate

court lacks jurisdiction. United States v. Nixon, 418 U.S. 683 (1974).

Here Petitioners' appeals to District Court were properly dismissed for their failure to file a brief. Their appeals to the Court of Appeals were dismissed for lack of appellate jurisdiction because the Bankruptcy Court Orders appealed from were interlocutory. Thus, it is clear the District Court lacked jurisdiction and the Circuit Court of Appeals accordingly lacked jurisdiction.

III. THE GERMAIN CASE HAS BEEN DECIDED AND IS IRRELEVANT.

Petitioners refer to Connecticut National Bank v. Germain, 926 F.2d 191 (2d Cir. 1991) as a case before this Court, the outcome of which will decide or determine this matter. This Court decided Germain on March 9, 1992, at No. 90-1791

in the manner Petitioners had apparently hoped; however, the Germain case is not relevant to this one.

Germain dealt with whether the Court of Appeals had jurisdiction to entertain an appeal of an interlocutory Bankruptcy Court Order from the District Court affirmance of that Order. The Court of Appeals construed 28 U.S.C. §§1292(b) and 158(d) together to reach the conclusion it lacked jurisdiction. This Court reversed and held that the Court of Appeals did have jurisdiction.

The distinguishing feature about Germain is that there, Connecticut National Bank sought and obtained leave to appeal the Bankruptcy Court's decision to the District Court and the District Court certified an interlocutory appeal under 28 U.S.C. §1292(b). See Germain, 926 F.2d at 192. Thus, both the District Court and

the Circuit Court of Appeals had appellate jurisdiction.

That is a sharp contrast to this case where Petitioners filed notices of appeal from interlocutory orders without obtaining leave from the Bankruptcy Court under 28 U.S.C. §158 (a) and Bankruptcy Rule 8003 and then filed notices of appeal from the District Court's orders to the Court of Appeals without obtaining certifications pursuant to 28 U.S.C. §1292(b) and Federal Rule of Appellant Procedure 5.

IV. THE DOCTRINE OF UNIQUE CIRCUMSTANCES IS INAPPLICABLE.

Petitioners assert they would have liked the opportunity to have an evidentiary hearing before the Court of Appeals to demonstrate the applicability of the doctrine of unique circumstances to justi-

fy or rectify thew tardiness of their appeal.

The doctrine of unique circumstances was formulated by this Court in Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964). There the district court judge had assured the plaintiff in open court on the record with the defense counsel present that plaintiff's post-trial motion was presented in ample time. Defense counsel did not object. Plaintiff relied on the court's pronouncement in not filing an appeal until the district court had denied the post trial motion. When the court of appeals dismissed the appeal because the post-trial motion was filed too late to postpone the time for filing the appeal, this Court reversed to correct the unfairness apparent from the face of the record.

In the case at bar, petitioners do not point to anything Judge Diamond did or

said on or off the record. They rely on off the record ex parte alleged conversations with a member of the judge's staff.

Those few cases where unique circumstances have justified the allowance of a late appeal are based on matters of record. See, e.g. Aviation Enterprises, Inc., 716 F.2d 1403 (D.C. Cir. 1983). The practice hauling the district court's clerks in the the court of appeals to testify about off the record conversations with counsel ought not be encouraged.

V. NONE OF THE FACTORS FAVORABLE TO GRANTING CERTIORARI IS PRESENT.

This case does not present any of the grounds for granting certiorari listed in Supreme Court Rule 10.1.

There is no conflict in the circuits over any of the issues petitioners seek to raise. There is a general consensus of

the circuits that the refusal ofa judge to disqualify himself is interlocutory and not reviewable by appeal. Rosen v. Sugarman, 357 F.2d 794 (2d Cir. 1966); Green v. Murphy, 259 F.2d 591 (3d Cir. 1958); General Tire & Rubber Co. v. Watkins, 331 F.2d 192 (4th Cir. 1964), cert. denied, 377 U.S. 952 (1964); In re Corrugated Container Antitrust Litigation, 614 F.2d 234 (6th Cir. 1956); United States v. Washington, 573 F.2d 1121 (9th Cir. 1978).

This Court has already squarely held that an order of a trial court disqualifying counsel is not appealable. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981). A decision refusing to remove a bankruptcy trustee would appear to be similarly interlocutory.

Efforts by a trial court to compel a party to produce evidence are not immediately reviewable unless enforced by crimi-

nal contempt. Doyle v. London Guarantee & Accident Co., 204 U.S. 599 (1907). Thus, the Bankruptcy Court's order in this case requiring the petitioners to file schedules of their assets and personal liabilities was not appealable.

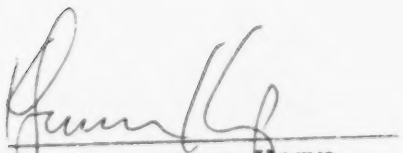
Nor does there appear to be any split of authority as to whether a court has the power to dismiss an appeal for appellant's failure to file a brief within the time period permitted. CA 1 Rule 45; CA 3 Rule 28 (2)(b); CA 4 Rule 45; Latham v. Crofters, Inc., 492 F.2d 913 (4th Cir. 1974); Hickman Garment Co. v. NLRB, 497 F.2d 1339 (6th Cir. 1974); CA 7 Rules 26, 31 (c); Stotler & Co. v. Able, 837 F.2d 1425 (7th Cir. 1988). Guam Sasaki Corp. v. Diana's, Inc., 881 F.2d 713 (9th Cir. 1989); CA FC Rule 31 (d); HBZ Communications, Inc., v. FCC, 825 F.2d 516 (DC Cir. 1987).

Petitioners do not allege that the three courts below have decided a federal question in a way in conflict with a state court of last resort or with applicable decision of this Court. Nor have they been able to articulate what important question of federal law has not been but should be decided by this Court.

If there has been a departure far from the accepted and usual course of judicial proceedings, it is the conduct of petitioners not the courts. It is the petitioners who have taken three meritless appeals from interlocutory decisions without seeking leave to appeal and then failing to file briefs on any of them then failing to take a timely appeal on one of them. They complain that the Court of Appeals did not warn them that the appeals might be dismissed for lack of appellate jurisdiction yet this is a matter about

which every appeallant must initially be concerned. The Third Circuit's Rule 21 (A)(1) requires every brief to contain a statement of the subject matter jurisdiction of that court including a certification that the appeal is from a final judgment or that the District Court has granted interlocutory appeal.

Respectfully submitted,



K. Lawrence Kemp

CERTIFICATE OF SERVICE

I, K. Lawrence Kemp, hereby certify that on April 17, 1992, I sent 3 true and correct copies of the Brief in Opposition to Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Third Circuit by first class United States Mail, postage prepaid, addressed as follows:

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